

A
DISCOURSE
CONCERNING
Bonds of Resignation
OF
BENEFICES,
In Point of
Law and Conscience.

By the Right Reverend Father in GOD,
EDWARD, Lord Bishop of *Worcester.*

L O N D O N,
Printed by J. H. for *Henry Mortlock*
at the *Phoenix* in *St. Paul's Church-*
Yard, 1698.

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THESE OURS

CONCERNING

Points of Religion

OF

BENEFICES

In Point of

Law and Conscience

By the Right Reverend Father in GOD
EDWARD, Lord Bishop of Worcester

LONDON,

Printed by H. Iohnes, at the Sign of the

Three Kings, in St. Pauls Church-yard

The PREFACE.

THE Intention of Writing and Publishing the following Discourse, was to give a stop, if possible, to a Dangerous and Prevailing Practice; and so much the more Dangerous, because it is managed with so much Secrecy, and Persons are often drawn into it, before they are aware of the Mischief of it. They are told, "That there is no Law against it; and
"that there are adjudged Cases and
"Precedents in Law for it; and that
"there is nothing amiss in the Bond of
"Resignation it self: But if there be
"any corrupt or evil Practice after it,
"that makes it fit to be condemned in
"Equity, but not in Law. But a
general Bond of Resignation of a Benefice upon Notice, in order to the obtaining a Presentation to that Benefice, hath
such

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such a Simoniackal Appearance, that any Person who pretends to Conscience, cannot but think it necessary to examine, how far such a Practice can be consistent, not only with the Law, but with the Oath which he is to take against all Simoniackal Contracts and Promises, directly or indirectly, &c. for or concerning the procuring or obtaining the Rectory or Vicarage of, &c. How can any Man that enters into these Bonds, say that he doth it not in order to the Obtaining a Presentation? And doth not such a Bond amount to a Contract? How then can they satisfy themselves in taking this Oath after such a Bond? All they can pretend, is, that although it be a Contract for such an End, yet it is no Simoniackal Contract. But which way are we to be satisfied in Point of Conscience, what is a Simoniackal Contract, and what not? Is it only from the Statute, 31 Eliz. c. 6. so that what is there forbid-

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den is Simoniackal and nothing else? But where hath that Law determined what Simony is, when it is never mentioned in it? It severely prohibits some corrupt Practices as to Benefices, but it never goes about to restrain the Notion of Simony to them (as will appear in the following Discourse) and the Ecclesiastical Laws, as to this matter, are left as they were before. If therefore there be such a true Notion of a Simoniackal Contract, as is allowed by our Laws, which is not confined to that Statute; then it must follow, that there may be a Simoniackal Contract, which is not condemned by that Law: and therefore all Persons who understand the Nature and Extent of our Laws, will have a care of restraining the Nature of a Simoniackal Contract to the Letter of that Statute.

It may be said, That a Simoniackal Contract is an ill Name put on we know not what, if we go beyond the

the Law of the Land; and that there must be some certain Bounds set to such hard Words; or else the Snare may be greater another way; and that there is no such thing as Real *Simony* in the case; but the Word is applied to some indirect Practices in obtaining Benefices, but what those are, the Law must determine. To which I answer, That I am very far from going beyond the Law of the Land for determining this matter. For I do acknowledge, that since the Notion of *Simony* is extended beyond the first Occasion of the Name, there must be a certain Rule to determine it; and That I do freely grant is the Law of the Land. But by it I do not mean a particular Statute made with respect to some more notorious Acts, which are punishable in the Courts of common Law; but I understand by the Law of England that comprehensive Body of Laws, which have been here received, as the Measure of

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of our Judgment and Actions in those things which are to be determined by them.

If a Question be made, Whether a Contract made at Sea, be a good Contract; It will be no good Answer to say, It must be a good Contract, because there is nothing in it contrary to the Rules of the Common Law. For if our Common Law should happen to allow such Contracts, which the Civil Law doth not; will it be Ground enough to affirm, That it is a good Contract, because our Common Law doth not condemn it? No certainly: But it must be determined by that Law which is proper for it, and being here received for such, is in such cases the Law of the Land.

So I say here; the Ecclesiastical Law, so far as it is receiv'd and allow'd by the Common Law, is the Rule and Measure whereby the Nature of Simony is to be determin'd; and that is allowed by our most learned and judicious Interpreters of our Common Law, to be of Ecclesiastical

stical Cognisance; only such Acts as
 come under Statutes belong to the Courts
 of Common Law. And there was a ge-
 neral Presumption in Law before, That
 no Patron was to make any Advantage
 to himself of a Right of Presentation.
Inst. 156. And therefore my Lord Coke saith, That
 a Guardian in Socage of a Manor
 whereunto an Advowson is appen-
 dant, shall not present to the Church,
 because he can take nothing for the
 Presentation for the which he may ac-
 count to the Heir: from whence he in-
 fers, That Simony is odious in the Eye
 of the Common Law. And it is very
 well if it so continues; which I can hardly
 imagine, if these Bonds of Resignation
 prevail. But if by the Ecclesiastical Law,
 as received here, such Bonds are Simo-
 niacal, being a Contract in order to the
 obtaining a Presentation, then it can give
 little Satisfaction to any Man's Conscience
 to be told, That they are not against
 Law, i. e. against the Statute, 31 E-
 liz. c. 6.

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My business is not here to give a full Account of the matters contained in the following Discourse, but only to remove some general Prejudices against the Design of it. Which is truly no other than to bring this secret Practice into open View, and to have it fairly examin'd and discuss'd. For, while it is managed in this manner, there is not only Mischief done to the Church, but to the Consciences of Men; who are very apt to suspect a Snare in all such Bonds, and are very uneasie at the Thoughts of them afterwards. If there be any better Reasons to be given for them than I have yet seen, I should be glad to be convinced of the Lawfulness of such indirect Practices. and private Contracts: But at present I think (if they be not timely prevented) they will end in unspeakable Mischief to the Parochial Clergy, who are the main Ecclesiastical Body of the Church of England, and in whose Welfare we ought to be all concerned.

And truly I cannot but be very tender

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in what relates to their Rights ; for their Work and Duty is great and laborious, if it be performed as it ought to be; and they ought not to have any new Burdens imposed upon them, under a Pretence of Law, which neither they nor their Successors will be able to bear.

I am very sensible, how much in this Age depends upon the Faithfulness, and Diligence, and good Reputation of the Parochial Clergy of England. For I am not much afraid of any Designs of our open Enemies (or which may be worse, of our pretended Friends) if we be true to our selves, i. e. if we seriously and conscientiously do our Duties with respect to God, the People, and our own Souls. If we do not give way to unreasonable Suspicions, and causeless jealousies of one another ; if we mind the Interest of Religion more than our own, and serve God, and not our own Lusts ; if we sincerely promote the best Ends in the World, the saving Souls, and doing good to Mankind, God will not be wanting
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to us : but he that hath saved us from the Lion and the Bear, will likewise save us from the Fox and the Viper ; I mean such who under fair and plausible Pretences eat through the Bowels of their Mother ; and by secret and indirect Practices go about to ruine the Church they profess themselves to be of ; although by their Works they deny it.

If I had not some more than ordinary Reason to believe such things to be not only practised, but encouraged by such who pretend, not only to understand our Law, but to direct the Nation in it, I should hardly have undertaken a Task of this Nature. But having so just an occasion to search into this matter, as well as I could, and finding so much cause of Dissatisfaction as to these Bonds, I thought it my Duty to do what lay in me to prevent that Mischief which is hastning upon our Church by them. If I am mistaken in any part of the following Discourse, I shall be glad to be better informed : and if I am not, I hope

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that

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that our Church may receive no disadvantage by it. And as I honour the Profession of the Law, and the many worthy Persons, who are, and have been of it: so I cannot but be concerned to find some Pretences of Law made use of to such ill Purposes and Designs; that if the number of Patrons that are against our Established Religion should happen to exceed those that are for it, by the help of these Bonds of Resignation, the Title to most of our Parochial Cures would in a little time fall into the hands of Popish Priests; which would much facilitate the Introducing their Religion; when so many Protestant Incumbents would so easily be turned out, by no other means, but by these Bonds of Resignation. And therefore it is not meerly the Interest, of our Parochial Clergy, but of our Religion, which lies at stake. And this, I suppose, will be sufficient to justify this Undertaking.

Westminster,
July 10. 1695.

E. W.

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DISCOURSE
CONCERNING

Bonds of Resignation, &c.

THE Design of this Discourse, is to enquire into a Case, too commonly practis'd among us, and too little examin'd ; which is concerning *Bonds of Resignation* given by Clergymen to Patrons in order to the obtaining a Presentation to a Benefice with Cure of Souls. This is a Case which respects both *Law* and *Conscience* : And it is not so easie a matter, as some seem to take it for granted, to resolve it as to either of them. For if such a Practice

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be within the Reason and Intention of the Law, which forbids all *corrupt Presentations and Resignations*, 31 *Eliz.* c. 6. then it cannot be justified by Law ; and if it be against the Scope and Design of the Oath against *Simoniackal Contracts*, then it can much less be justified in Point of Conscience. And whether it be or not, is the Subject of this present Discourse ; which I am sorry there is so much occasion for ; But since there are too many that practise it, and others too ready to defend it ; and since it is of so mischievous Consequence to the Interest of the Church of *England*, if it prevails, I think it highly necessary to enquire more strictly into this matter, than hath been hitherto done. Which I shall do in such a manner, as to make it appear that no Considerations whatsoever have swayed me, but those of *Law and Conscience* ; and I hope those who have been drawn into such

Snares

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Snares, will see cause to repent, (if they do it not already) and others take care how they run themselves into such Perplexities, which no Precedents in Point of Law, and no Authority in Point of Conscience can give them Satisfaction in.

But I intend no Reflections on particular Persons; and I cannot believe that any who have impartially weighed these things, can maintain the lawfulness of them so, as to wish them *generally practised*. For, however there may be some Cases wherein such Bonds may be thought far more reasonable than in others; yet it cannot be denied that there are far more Cases, wherein such a Practice must be destructive to the Legal Rights of the Church. Suppose some Patrons to be Persons of great Piety and Integrity, who do require these Bonds only to bind the Clergy the more strictly to do their Duty; Suppose others

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others have no Regard to their own Interest, but only take care of Minors, bred up with a Prospect of such Benefices which they are not yet capable of: (which are the most reasonable Considerations insisted upon in the Adjudged Cases :) but what are these to the multitude of most unjust and unreasonable Considerations, which may be made the Conditions of these Bonds ? For the Bonds are supposed to be General, and so the Patrons left at liberty to impose their own Conditions. And, are there no such kind of Patrons among us, who may be too justly suspected to mind their own Interests above the Church's Good? and therefore will take all Ways to lessen the Profits of Benefices in their Disposal, as far as they are told that the Law permits them? Such, I mean, who have no Restraint but what the Law lays upon them, having no Sense of Honour or Conscience

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science in these matters. And if it once pass for an allowed Doctrine in Law, That Bonds of Resignation are lawful, what shall stop such Men from putting very unreasonable Conditions upon their Incumbents, or else they may presently call them to an Account for the Forfeiture of their Bonds? If then there be no effectual course so much as offer'd against very hard and unreasonable Terms; how can such Bonds be thought Just and Reasonable?

It may be said, That if the Conditions be such as are allowed by Law, then the Bonds are lawful, otherwise not. But this by no means clears the Difficulty. For the main Question is, Whether such Bonds be lawful, where the Conditions are not expressed, but meer Notice of three or six Months? And these are the general Bonds of Resignation: and such, I think, I may with Reason affirm to be against both
Law

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Law and Conscience. But suppose there may be Conditions of both kinds required, but it is not expressed in the Bonds what they are: what a miserable Slavery must the Clergy be under, who give general Bonds, and know not what Conditions will be required? And then they must go to Law, and be at greater Charge and Trouble than they can well bear, to know whether the Conditions required of them be such as the Law allows or not? So that the general allowance of Bonds of Resignation upon Notice, although the Law be left to determine the particular Conditions, is that which we have Reason to look upon as very hard and unjust, and inconsistent with the Nature and Design of that Relation which the Law supposes between Patrons and Incumbents, as will appear more afterwards.

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There are two things chiefly insisted on by those who plead for these Bonds of Resignation.

I. That there is no Law against them.

II. That there have been Cases adjudged for them: And both these I shall carefully examine.

I. That there is no Law against them. There are two Laws to be consider'd in this matter.

1. The Law against Simoniackal Contracts, 31 *Eliz.*

2. The Law which requires every Incumbent to take an Oath against Simony.

I. As to the Law against Simoniackal Contracts: The Statute is expressly against *Presenting to a Benefice for a Summ of Money, Reward, Gift, Profit,*

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fit, or Benefit, directly or indirectly, or entring into Bond or Covenant for that Purpose, 31 Eliz. c. 6. n. 5. Wherein these things are observable:

(1.) That it is not a meer *Summ of Money* which is here forbidden, but any *Benefit whatsoever directly or indirectly.*

(2.) That not meer *doing the thing;* but *entring into Bond or Covenant to do it* is within the Reach of this Law.

(3.) That the Penalty is against such *who do present for, or by Reason of any Promise or Agreement for any Benefit whatsoever:* or those *who do accept such Presentations on those terms:* i. e. so as it becomes the Motive of such Presentation or Acceptance.

(4.) That the same Law declares *n. 8. against corrupt Resigning or Exchanging the Benefice he enjoys, for any Summ of Money or Benefit whatsoever.*

(5.) That the Ecclesiastical Censures still remain in Force against these

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these Offences: which supposes that this Law doth not supersede the Ecclesiastical Laws here in being, n. 9.

So that here are two material Questions to be resolved upon this Statute.

[1.] Whether since the making this Statute, there be any Simoniacal Contract, but what is against the Purport of it?

[2.] Whether a Bond of Resignation, upon which a Benefice is given and accepted, be within the Design of it?

[1.] As to the former; it is observable, that the words *Simony* or *Simoniacal Contract*, are never mentioned in this Statute. For, if they had, the Judges would have had sufficient Reason to have declared what was *Simony*, and what not. We are told indeed by the Reverend and Learned Judges in the Case of *Mackaller* Cr. Car. 361. and *Todderick*, That the Consideration

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to have Money to procure one to be Rector of a Church, is a Simoniackal Contract, and an unlawful Act condemned by all Laws: and that the Common Law before the Statute, 31 Eliz. took notice of it. But they do not declare how far the Common Law could take notice of it, before that Statute, any farther than that it was not a thing allowed by it. For certainly it was then of Spiritual Cognisance; and the Persons guilty of it were to be proceeded against by the Ecclesiastical Laws. And consequently, the Notion of *Simony* is to be taken from thence, and not meerly from this Statute: so that if accepting a Benefice upon giving a Bond of Resignation were *Simoniackal* before, it doth not cease to be so by this Statute. Indeed corrupt Resignation of a Benefice hath not the same Penalty by this Statute with corrupt Acceptance of it at first: for that is a Disability, and the

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the other double the Value. But hereby we see that the one is against the Law, as much as the other. So far then it is clear by this Statute, that any *corrupt Resignation* is against Law: and if the Enquiry be after the Penalty, the Statute must determine that. But if the Question be, Whether Resignation upon a Bond given beforehand in order to a Presentation, be a *Simoniackal Act* or not, as done in Pursuance of a *Simoniackal Contract*? in That the Statute gives no Rule, but only declares the Penalties of some particular Acts, which are there expressed:

Those who would have nothing now to be *Simony*, but what is there forbidden, must first prove that the Intention of the Law was to limit and determine the Nature of *Simony*; which (as is already observed) is not so much as mention'd in it. The Reason of the Law as to Penalties is

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one thing, and the Nature of a *Simoni-
acal Contract* another. If a Question
be put, Whether a *Simoniacal Contract*
be void in Law or not? My Lord
Coke saith, That the Statute doth not
make the Bond, Covenant, Promise, or
other Assurance, void, but the Present-
ment, &c. and so it was adjudged, 40 E-
liz. This is somewhat strange Do-
ctrine, that a *Presentment* should be
void by reason of a *Simoniacal Bond*,
and yet that Bond not be void in Law.
For that which makes another thing
void, one would think should be
void in it self; especially since he
saith in the same Chapter, That *Sim-
ony* is odious in the Eye of the Common
Law. But not so very odious, if a *Sim-
oniacal Contract* be a good Contract ac-
cording to the Common Law. But
he distinguisheth between *Malum in se*
against the Common Law, and *Malum*
prohibitum by Statute-Law. How doth
this clear the Point? The *Presentari-*
on

3 Inst. 153.
Marg.

F. 156.

on is void, being prohibited by the Statute: But is, not a Simoniacal Contract *Malum in se*, against the Common Law? How then comes this not to be void? especially since it is *contractus ex turpi causa*: And for that reason my Lord *Hobart* held it void *Hob. f. 167.* in Law; and so the Court held in *Mackeller's Case*. But suppose my Lord *Coke* in the right, as to a Simoniacal Contract, that it is not void at Common Law: it follows from thence, that the consideration of Law and Conscience is different in this matter. For I suppose none will deny that a Simoniacal Contract is unlawful in point of Conscience: and yet he asserts it, not to be void in Law. Why then may not Bonds of Resignation, although not within the compass of this Statute, yet be unlawful in point of Conscience, as well as a Simoniacal Contract be unlawful in point of Conscience, and yet be

good by the Common Law? Either therefore Simony, as odious as it is in the Eye of the Law, must not be *Malum in se* against Common Law, as my Lord Coke speaks; or if it be, there must be another Rule of Conscience in this matter from this Statute. I would fain know what was Simony at Common Law before this Statute; and whether that which was so before, doth not continue so still, if it be not taken away by it? For, if there be no Simony now, but what is expressed in that Statute; then it must declare what is Simony, and what not. Simony, saith my Lord Coke, is described by this Act, 31 Eliz. and he saith in his Margin, *Injustum est illa vendere, quæ gratis distribui debent*: which is a very good Illustration of it. But the Question is, What is meant by Selling? Whether it be meerly for a Summ of Money paid down, or secured by Bond or Covenant? or whe-

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whether it doth not take in any kind of Benefit or Emolument accruing to the Person who bestows it, which hinders it from being a Free Gift?

The Casuists say, *Nomine emptiois & venditionis intelligitur omnis contractus non gratuitus.* Sylvest. v. Simon.

But can that be called a Free Gift, where there is a Bond of Resignation of such a thing, whereof the Possession and Reversion bear a Price, and have a real Value? We need not run to Simon Magus to understand what *turpe commercium* is.

There were many Laws among the old Romans against purchasing any Publick Offices; and they thought it a great Reproach to them for any Price to be set upon them: as the great Roman Master said, *Pretium quod* Sigon. de Jur. dicl. 2. c. 3a

habet, hoc ipso vilescit. By the Laws, *Acilia* and *Calpurnia*, all that were convicted of giving Money for Offices, were under a Disability, or Incapacity of any for the future; and the Mer-

V. Ciceron. pro P. Sestio Dion. l. 15.

Lamprid. in
Alex. Sever.
Arist. Pol.
l. 2. c. 12.

catores Potestatum were Infamous by their Laws. Aristotle thought it a matter of very ill Consequence to any Government to have any thing of money given for Offices; because it taught Men to set a greater Value on Money than Virtue. These Considerations, setting aside the Story of *Simon Magus*, were great enough to induce the Christian Church to be extremely nice and tender in this matter of Benefices; and not only to forbid the direct Sale of them for Money, but any indirect Trafficking which might take off the entire Freedom of the Presentation of Persons to them. I know to how little purpose it would be, to reckon up all the Canons which have been made in the Christian Church from the Apostles Times downwards against *Simony*; because some will say, That the Ecclesiasticks were always true to their own Interest. But let us set aside all Prejudice

judice in this matter, and consider it impartially. If any Offices in the World ought to be free from the Suspicion of *sordid Trafficking*, certainly those of the Church ought, from the Nature and Design of their Employments. The Question then will come to this, Whether giving a Bond of Resignation, in order to the procuring a Benefice, be such a Trafficking or not? And we have three Rules to judge by:

1. The Nature and Reason of the thing: whether such Actings be not inconsistent with that Freedom which ought to be used, both in Giving and Taking Ecclesiastical Benefices? So that if there were no Laws either Ecclesiastical or Civil in the case; whether there be not something in these Transactions unbecoming the Design and Dignity of the Employment?

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2. The Ecclesiastical Law of England, which hath been from time to time receiv'd here, and allow'd by a general Consent, and still continues in Force, where it is not repugnant to any Laws of the Realm; which cannot be pretended in this case.

3. The Statute-Law; which doth not abrogate the Ecclesiastical Law, as to Simony; it only Enacts some particular Penalties on some more remarkable Simoniackal Acts, as to Benefices and Orders; but never once goes about to repeal any Ecclesiastical Laws about Simony, or to determine the Nature and Bounds of it.

[2.] But let us come more closely to the Statute it self, to see whether these Bonds of Resignation be not against the Design of it. The Words are, *If any Person for any Summ of Money, Reward, Gift, Profit or Benefit directly or indirectly; or for, or by reason* of

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of any Promise, Agreement, Grant, Bond, Covenant, or other Assurance of or for any Summ of Money, Gift or Profit whatsoever, directly or indirectly; shall present, &c. Now we suppose a Patron to present one to a Benefice, without any Money, or Bond for Money; but he declares before his presenting him, That he must enter into a Bond to Resign his Benefice upon Six Months Notice, under a severe Penalty: to which he submits, on the Condition of obtaining his Benefice. After this, the Patron demands such a Portion of Tithes; or a Consent for him to Inclose, to the apparent Benefit of the Patron, and Diminution of the Profits of the Living. The Question is, Whether such a Bond be within the Design of this Statute? All that can be said, is, That no such Consideration is expressed in the Bond, which is in general Terms: which implies, That if the Consideration had

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had been expressed in the Bond, it had been plainly against the Law. But suppose it be left out of the Bond: is not the Penal Summ of the Forfeiture of the Bond sufficient to make the poor Incumbent comply with the Terms proposed afterwards? If none but just and reasonable things had been intended, why were they not clearly expressed in the Bond it self, so as to prevent any Fear or Jealousie of worse Designs? Have no such things ever been practised, or heard of among us? If there had not, doth it not look like a Contrivance to deceive the Law, and to hamper the Consciences of those who take Benefices? And whatever is done in *fraudem Legis*, is against Law: for it frustrates the main Intention and Design of a Law without breaking the Letter of it; which is the worst way of defeating a Law.

But

But we are told, That our Courts of Law are to judge according to the Law; and not according to an equitable Construction of the Intention and Design of it. If it be really so, it doth only shew that such Courts are under a strange Limitation, which are tied up to the Letter of a Law, against the main Scope and principal End of it. But by the Judges Oath; 18 E. 3. n. 2. 20 E. 3. n. 1. they are bound to do *Equal Law* and execution of Right to all the King's Subjects, &c. What is here meant by *Equal Law*? Is it to pursue the Letter of the Law against the Reason and Design of it?

There are two sorts of *Equity* to be consider'd among us;

1. An *Equity* founded upon a reasonable Construction of Law, according to the Intention of it.

2. An *Equity* for which the Common Law hath made no Provision;
as

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as in Cases of Fraud, Accident and Trust: which is the true Foundation of the Court of Equity in Chancery, viz. to supply the Defects of our Law in in those Cases.

The Question now is, Whether the Judges at Common Law are so tied up to the bare Letter of it, that they cannot take in such Cases, which are according to the Reason of a Law, but not within the Words of it? And my Lord Coke allows this sort of Equity. For, saith he, Equity is a Construction made by the Judges, that Cases out of the Letter of a Statute, yet being within the same Mischief or cause of making of the same, shall be within the same Remedy that That Statute provideth. These are remarkable Words of this great Oracle of the Law, and ought to be well weighed and considered in all such Cases as this. And he afterwards saith, That Equity is the Reason of the Law, which weighs Cases according to their

* Inst. 24. b.

their due Measures; and so gives in
paribus rationibus paria Jura & Judicia.
 If then these Bonds of Resignation
 are within the Reason of this Law,
 and tend to the same Mischief, they
 ought to have the same Remedy; and
 it cannot be made any just Plea for
 them, that they are not within the
 Letter of the Law.

H. I now come to consider the
 Oath against Simony, which every In-
 cumbent is bound to take; which
 runs in these Words; I, A. B. do swear
 that I have made no Simoniackal Payment,
 Contract or Promise, directly or indi-
 rectly, by my self or by any other, to my
 Knowledge or with my Consent, to any
 Person or Persons whatsoever, for or con-
 cerning the procuring or obtaining of the
 Rectory or Vicarage; nor will at any time
 hereafter perform or satisfy any such kind
 of Payment, Contract or Promise made by
 any other without my Knowledge or Con-
 sent.

Simony,

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Simony, saith my Lord Coke, is the more odious, because it is ever accompanied with Perjury; for the Presenter is sworn to commit no Simony.

Here are two things fit to be considered:

1. That the Oath is not merely against direct Simony, but against any Simoniack Contract for obtaining a Benefice.

2. That this Oath is not limited to the Statute, 31 Eliz. nor made in pursuance of it, but was in being long before; and therefore must have its Interpretation from the Ecclesiastical Law, as it was here receiv'd; and not from the Words of the Statute, which do not mention a Simoniack Contract. We must then enquire what was a Simoniack Contract by our Ecclesiastical Law.

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C. de Furejur.
Presens. Stat.

In our Provincial Constitutions, which were receiv'd as part of our Law relating to Ecclesiastical Mat-

ters,

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pers, there is one about an Oath to be taken by every one presented before the Bishop: That for the obtaining the Presentation, he had neither promised, nor given any thing to him that presented him; *nec aliquam propter hoc inierit pactionem*, nor enter'd into any Bond or Covenant for that end: not a Covenant to pay a Summ of Money, but to obtain the Presentation. *Propter hoc*, saith Lyndwood, *sc. ut presentetur*: and he declares it before, that whatever is done with an Intention to induce the Patron to present, is *Simoniacal*; and whatever Compact any enter into for that purpose, is a *Simoniacal Contract*. Nay, he goes so far as to say, the doing any thing with that Design to obtain a Benefice, makes it a *Mental Simony*: (which reaches not to the Oath, and requires no more but Repentance) but if there be a Bargain between the Patron and the Party to be presented, he

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he declares it to be a *Simoniackal Contract*. He puts the Question, If a Person offers to serve a Patron for a Year or two, with that Intention to obtain the Presentation to such a Benefice by it, Whether such a one can with a safe Conscience take the Oath? He answers Negatively, If this were his principal Design, and there were a Bond or Covenant between them to that purpose; for this were *Simony*. From whence it follows, that any Bond or Covenant entered into for that End, to obtain a Presentation, was *Simoniackal* according to the Sense of our Law Ecclesiastical.

In the time of Archbishop Courteney, the Form of the Oath was more full and express, as it is extant in the Archbishop's Register called *Morton*, and in *Spelman's Councils*: for there is this Clause added, *That neither themselves, nor any Friends of theirs are under any Bonds about the Resignation or Exchange*

change of their Benefices. Here the Oath is expressed against any Bonds of Resignation. But why is this Clause left out since? Because it was supposed to be sufficiently implied in the other Words; since this was at least an indirect Simonical Contract.

It may be said, "That Men are not now tied up to the Canonists Opinions about Mental and Conventional Simony." For our Law owns nothing but Real Simony, i. e. either Actual Payment, or a Bond to pay such a Summ of Money to obtain a Presentation; and if there be no Contract for that End, it is no Simonical Contract according to our Law.

This is all that can be said in this Case; but I think it can give no considering Man satisfaction. For the Intention of the Law, in being so strict and severe against all Simonical Contracts, was twofold.

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1. To preserve the Dignity of the Sacred Function ; which could never be upheld, if mean and sordid Trafficking were allowed as to Benefices. For the People can never have any due Respect or Veneration for a Person, whom they suspect to have come into his Place among them by indirect Practices ; although it be not the Payment of so much Money. For they have so much Sense as to know, that what is valuable by Money, is as good as Money, according to its Proportion : and if a Man gives a Bond to Resign his Living upon Notice ; they know how much this abates of the Value of it to him, when he holds it on such a precarious Title ; and that he gives so much to obtain the Living as it is of less Value to him, than if he had it without any such Bond. He that is forced by a Bond to resign his Benefice, must part with what was really valuable to him, as

much

much as the Possession of it for so many years, as he might otherwise enjoy it, would come to: and he that gives a Bond to that purpose to obtain a Presentation, doth oblige himself to give to the Patron so much as that Interest can be valued at. Is not a free unconditional Interest in a Benefice really more valuable, than that which depends on the Pleasure of another? If it be, then he that gives a Bond of Resignation, doth give something really valuable in Money, to obtain the Presentation. And how can this be excused from *Simony*? Yes, some may say; *Simony* is only a frightful Word used by *Ecclesiasticks* to deterr People from making the best of their own: whereas the true Notion of *Simony* is only buying the Gifts of the Holy Ghost: but what Relation is there between the Gifts of the Holy Ghost and a Benefice?

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I do not think there are any so weak, as to imagine the Gifts of the Holy Ghost can be purchased with Money given to Patrons; and if they could, the Dealers in such Bargains would not think them worth their Money; which they could lay out upon things of greater Value to them. But here lies the true State of the Case. It hath been the Wisdom and Charity of Princes and other Persons of Estates, to make Endowments of parochial Churches for the Support and Incouragement of those in Holy Orders to attend upon the Service of God in them: and the Law of the Land, hath so annexed the Spiritual Duty with the Temporal Advantage, that no one can be capable of the latter, that is not obliged to the other. So that the Right of discharging a Spiritual Trust, and the Right of enjoying the Profits go together. But to prevent the unspeakable

able Mischief of purchasing the Profits which are devoted to such a Spiritual use, this hath been called by the detestable Name of *Simony*; and very severe Laws have been made, not only against the giving of Money, but the using of any indirect Means to obtain a Presentation. Because such things do lessen the Esteem of those who use them; and not only thereby make them more incapable of doing Service, but exposeth the Sacred Function it self to Contempt.

2. Another great End of these Laws, is to keep the Clergy from Oppression and Slavery. I am far from going about to lessen the Just and Legal Rights of Patrons, who by our Laws enjoy some Privileges, which are not allowed them in other Countries, where the Ecclesiastical Law is stricter than here in *England*: as in the Liberty of Selling the Rights of Advowsons; their Trial at Com-

mon Law ; the six Months for Patrons, &c. But for our right understanding the present matter, it must be consider'd, as to the Rights of Patrons, That it was not an Original and Absolute Right to dispose of Benefices as they pleased ; but a limited Trust reposed in them, to put in Fit Persons to discharge the Duties of their Places. It is very well known to all Persons who have looked into these Matters, that in the first Settlement of this *Church of England*, the Bishops of the several Diocesses had them under their own immediate Care ; and that they had the Clergy living in a Community with them, whom they sent abroad to several Parts of their *Diocesses*, as they saw occasion to imploy them ; but that by Degrees, they saw a necessity of fixing Presbyters within such a Compass, to attend upon the Service of God among the People that were
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the Inhabitants : that these Precincts, which are since called *Parishes*, were at first much larger, and cast into such Divisions in each Diocess, as probably make up the several *Deanaries* since : that when Lords of Manors were inclined to build Churches for their own Conveniencies, they found it necessary to make some Endowments, to oblige those who officiated in their Churches to a diligent Attendance: that upon this, the several Bishops were very well content to let those Patrons have the Nomination of persons to those Churches, provided they were satisfied of the Fitness of those persons, and that it were not deferred beyond such a limited time. So that the Right of Patronage is really but a limited Trust ; and the Bishops are still in Law the Judges of the Fitness of the persons to be employed in the several parts of their Diocesses. But the Pa-

2. Inst. 361.

Bract. l. 4.

341.

Ext. de Jure

Patron. c. 22.

Fleta l. 3. c. 14.

Fleta l. 3. c. 14.

trons never had the Absolute Disposal of their Benefices upon their own Terms; but if they did not present Fit persons within the limited time, the Care of the places did return to the Bishop, who was then bound to provide for them. Some pretend, That before the Lateran Council, there was no time of Lapse to the Bishop, if the Patron did not present; but that the Bishop was to provide one to serve the Cure in the mean time, and the Patron might present when he would. But this is certainly a Mistake, however it be asserted by persons of great Authority. My Lord Coke cites Bracton and Fleta for it: but I can find nothing like it in either of them. Bracton indeed speaks of the time of lapse by the Council of Lateran, which was to be after six Months, if a Dispute hapned about the Title; and this Constitution is extant in the Decretals; and the same Words are used by Fleta: but not a Word in either

either of them of any unlimited Power which Patrons had before, as far as I can find: Which made me wonder at such a Maxim, as I find by several father'd on Bracton, *Ante Concilium Lateranense nullum currebat tempus contra Presentantes*. But Rolls very fairly reports it just as it is in Bracton; yet afterwards he recites Mr. Selden's Words. Before this *Lateran Council*, Alex. had sent a Constitution hither, which allow'd the Bishops, in case any Difference hapned about the Patronage, to sequester the Profits, without fixing the Time: which is all the Foundation I can meet with for this famous Maxim. But before this we may observe several Canons of Councils, which limited the Patrons to three Months. These Canons were never receiv'd in England; which, if I mistake not, had always the Privilege of six Months for Patrons. This I ground upon the Register, a Book of great Authority, and con-

Selden of
Tithes, c. 12.
389.
Abridgment,
2. 354.

Ext. de Offi-
cio Jud. Or-
din. c. 4.

Eugen. 2. in
Synod. Rom.
c. 24.
Leo 4. in Sy-
nod. Rom.
c. 25. Ed.
Holfst.

Registr. f. 42.

considerable Antiquity, where it is said expressly, That the Bishops have not the Right of Lapse till six Months are passed; which is said to be *secundum legem & consuetudinem Regni Angliae*, according to the ancient Custom and Law of England. And the like was observed in the old Customs of Normandy.

*Cust. Norm.
Art. 69.*

But by the Ancient Law of England, notwithstanding the Right of Patronage, the Bishop of the Diocese had these Rights reserved to him:

1. The Right of Admission of the Person presented.
2. The Right of Lapse, or bestowing the Benefice, if the Patron failed his six Months.
3. The Right of making an Avoidance, by Deprivation or Resignation.

1. The Bishop hath by Law the Right of Admission of the person presented by the Patron. For here from the

the time of Christianity being received among the Saxons, at least as far as we can trace any Footsteps of the Settlement of a Parochial Clergy, it was expressly provided for ; That no Presbyter should be fixed in any Places, without the Consent of the Bishop. For this we have a Canon of Theodore Archbishop of Canterbury, preserved by Egbert Archbishop of York (each the Seventh in their Sees, but at some distance of time) in his Collection of Canons : the words are, *Statutum est ut sine Autoritate & Consensu Episcoporum, Presbyteri in quibuscumque Ecclesiis non constituentur, nec inde expellantur ; & si quis hoc facere tentaverit, Synodali Sententiâ feriatur.* So that by the Original Constitution of this Church the Bishops had the power of fixing Presbyters in Churches, and of Removing them if there were occasion, and no other persons could do it without them. This doth by no means

Spelm. Concil.

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infringe the Right of Nomination or Presentation of Fit persons to the Bishop: but it implies that no such Presentation was sufficient, unless the Bishop did first approve and consent to the person, Wherein the Ancient Right of Patronage here in *England* did consist, we cannot have a better Account, than from the Words of all the Nobility of *England* in their Remonstrance to *Gregory IX.* when he attempted to incroach upon them by Papal Provisions: *Cum igitur à primâ Christianitatis Fundatione in Angliâ, talia fuerint hætenus progenitores nostri gavisi libertate, quod decedentibus Ecclesiarum Rectoribus, Ecclesiarum Patroni Personas idoneas eligentes ad easdem, Diocesanis præsentaverunt ab eisdem Ecclesiarum Regimini præficiendas.* These are Words of great Weight, and do plainly shew, that the Right of Patronage consisted in the Nomination of Fit Persons to the

Matth. Paris,
A. D. 1239.
p. 513.

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the Bishop of the Diocess for any vacant places: but that the Bishops were, if they approved them, to put them into the possession of them. In

the time of Innocent III. the King wrote to the Pope; *That the Nobility* Innocent. Epist. l. 1.

and Bishops of England did insist upon it, as their Right by the Ancient Custom, to build Churches on their own Lands;

and the Pope yielded it to the Laity, provided that they had the Consent of the Bishop of the Diocess, and that the

Rights of former Churches were not prejudiced thereby. But saith Mr. Selden,

Selden of Tithes, 361.

they challenged it without Licence. What to do? To build Churches on their own Lands: but not a word of putting

in any Incumbents by their own power without the Bishop's Consent and Approbation: Nay, it appears

that they could not build Churches on their own Lands without the Bishop's Allowance. Mr. Selden would

F. 387.

have it believed, *That the Right*
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of Presentation to the Bishop of the Diocess came in by the Canon Law about A. D. 1200. But the Insinuations of that kind, as they are frequent in his Book of Tithes, so they do shew his want of Skill or Ingenuity at that time, as much as any one part of it. But I need go no farther than this Letter of the Nobility to the Pope, who were extreemly jealous of their Rights of Patronage, and yet they challenged nothing thereby, but a Right of Nomination of a Fit person to the Bishop of the Diocess, not a word of Investiture or Collation by the Patron, which Mr. Selden talks of. He doth not deny, That after A. D. 1200. it was the undoubted Law of England for the Patrons to present to the Bishops. But I say, it was the Law of England before ever the Decretals were made: it was the Original and Fundamental Law of the English Church, and as Ancient as the Right of Patronage.

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tramage. In the same Epistle they desire the Pope to leave them to their Ancient Liberty, which was *Personas idoneas presentare*. But who is to be Judge of the Fitness of the Persons? For that we have a full Declaration of the Ancient Law and Custom of England, in *Artic. Cleri, c. 13. De Idoneitate Personarum presentatum ad Beneficium Ecclesiasticum, pertinet Examinatio ad Judicem Ecclesiasticum, et ita est hactenus usitatum, et fiat in posterum*. Upon which my Lord Coke saith, That the ^{2 Inst. 632} Examination of the Ability and Sufficiency of the Person belongs to the Bishop, who is the Ecclesiastical Judge; and in this Examination he is a Judge, and not a Minister, and may and ought to refuse the Person presented, if he be not *Persona idonea*. And that this was no new Law, appears by the words, That it had been hitherto so used, and should be so for the time to come. And so Coke truly saith, That this Act was
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but a Declaration of the Common Law and Custom of the Realm. So that the Bishops power of Examining and Judging the Fitness of the Person presented, is a part of the Common Law of England.

15 H. 7. 8. It is declared by all the Judges, That the Bishop in the Examination of a Clerk, is a Judge and not a Minister. And if he misbehaves himself, he is to be punished as a Judge.

8 H. 7. Keilway saith, That the Bishop may refuse for Insufficiency, and is to give notice to the Patron.

It was resolved by the Court in Specot's Case, That the Court is to give credit to the Bishop acting Judicially, but then it is said, That the Plea must be special and certain.

And so Coke saith, That in a Quare Impedit brought against the Bishop for Refusal of his Clerk, he must shew the cause of his Refusal specially and directly.

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But it was the Opinion of Lord Chief Justice *Anderson*, That in things *Anders. 190.
Leon. 3. 200.* not triable at Common Law, a General Plea was sufficient. But when the Case came to the King's Bench, 32 Eliz. it was there said, That the *Articuli Cleri* mention a Reasonable Cause; which, say they, must be Special: for *causa vaga & incerta non est rationabilis*. But the main point is, Who is to judge what is a Reasonable Cause? and I cannot but think that *Anderson's* Opinion is the truest and most reasonable. If it be for a matter triable at Common Law, that Court is to judge; but if not, I do not see how it can be avoided, but the Bishop must judge; and his Judgment of *Insufficiency* must be taken, as well as in any Certificate whatsoever. For, if the Law trust him with the Judgment of a Matter proper for him to judge of; other Courts which have no Cognizance of it, must give credit to such a Certificate:

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cate: or else they must take upon them to judge in Matters that are not of their Cognizance, which is to confound the Jurisdiction of Courts. I grant, the Judgment of the Bishop is not Conclusive; but the Appeal then lies to the Supreme Ecclesiastical Court, and the *Metropolitan* is to be Judge of the Sufficiency of the person.

“But is not this a great Prejudice to the Right of Patrons, if the Bishops are to judge of the Fitness of persons presented; and so the Patrons Presentation may signifie nothing, if the Bishop pleases?”

This is a Trust which the Law reposes in the Bishop, and it lies upon his Conscience to act sincerely in this matter, and in case of *Examination of Fit Persons*, a Trust must be placed somewhere; and in whom more properly than in the Bishop of the Diocess? to whom the Care of it doth especially belong, and that by as plain Law

Law as any we have. Are not all Judges trusted in Matters that come before them ? But this is no Decisive Judgment : for an Appeal lies according to the Nature of the Matter. And this is no other Trust than hath been allow'd in all other Christian Nations, where the Rights of Patronage are owned. *Justinian* owns it several times in his *Novels*, not only that the Bishops are to Examine and Approve those who are nominated by Founders of Churches ; but if they find them unworthy, they may put others in their room. By the *Capitulars*, or old Ecclesiastical Laws of *France*, the Lay-Patrons are not only to present to the Bishop such as were *Probabilis Vitæ & Doctrinæ*, but if upon Examination they found them otherwise, it was in their power to reject them. As to the Canon Law there can be no Dispute in this point : but if the Bishop refused, an Appeal did lie to the Pope ; and if he were

Novel. 53.

Tit. 12. c. 2.

123. c. 18.

Cap. 1.1. c. 84.

l. 5. 98.

Addit. 4. 95.

Ext. de Jure

Patr. c. 29.

*Rebuff. de
Nomin. n. 10.*

*Fra. de Roye
de Jure Pa-
tron. Proleg.
c. 25.*

unjustly refused, the Bishop was bound to provide for him: but during the Appeal, the Patron might present another; whom if the Bishop approved, the Appeal did fall. *Rebuffus* a noted Lawyer saith, That it is a damning Sin in a Bishop, not to Examine the Fitness of those who are presented by Patrons. And a late learned French Canonist saith, Those are to blame who lay the Fault of so many unworthy Men being in Places on the Lay Patrons. For, saith he, the Bishops are to blame, who are bound to Examine, and if they see cause, to reject them. So that we have not only our own Law, but the General Consent of the Christian World, where the Right of Patronage is allow'd, as to the Bishop's Right of Examining and Judging the Fitness of persons presented to Benefices.

2. The Right of Collation upon Lapse belongs to the Bishop, notwithstanding the Right of Patronage. It

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is said by Lord Hobart, That a Lapse ^{Hob. 154.} is not an Interest naturally, but a meer Trust in Law; and afterwards, That the Ordinary, or he that is to present by Lapse, is as a kind of Attorney made by Law, to do that for the Patron, which it is supposed he would do himself, if there were not some Lett.: and therefore the Collation by Lapse is in the Right of the Patron, and for his Turn. This seems to me to be a mistaken Notion of a Lapse: for the true Question is, Whether upon a Lapse the Ordinary doth collate *Jure pleno*, or *Jure devoluto*? Some French ^{De Roye de Jure Patr. p. 95. 145.} Lawyers held the latter; but Car. Molinaeus and others utterly reject that Opinion, for this Reason; because Churches and Diocesses were *Jure communi* under the Care of the Bishops; but it was by particular Indulgence, that the Patrons had the Right of Presentation: which being neglected, things do return to common Right: and therefore the Bishop hath a true Interest,

and acts not in the Right of the Patron, but his own.

Dr. & Stud.
c. 36. 125.

It's true, there is a *Devolution* afterwards by our Law: for as the Author of the *Doctor and Student* saith, The Law of the Realm is, that if a Benefice falls void, then the Patron shall present within six Months; and if he do not, that then the Ordinary shall present: but yet the Law is farther in this case, That if the Patron present before the Ordinary put in his Clerk, that then the Patron shall enjoy his Presentment: and so it is, though the time should fall to the Metropolitan. For, as he saith, by our Law, if the Bishop doth not collate within six Months, then the Metropolitan presents. But this is by a Right of *Devolution*, and then why not the other?

The Answer is, That the Bishop is Ordinary of the Diocese, and therefore it comes to him of common Right: but it falls to the Archbishop, not as Ordinary, but as Superiour; to whom

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the *Right of Devolution* falls upon the *Inferiour's Neglect*. For, although in some respects, and in the excepted Cases, the *Archbishop* may be said to be *Ordinary of the whole Province*: yet that is not so much in respect of *Immediate Jurisdiction*, which *Hobart* and others say, was by *Virtue of the Legatine Power* which was annexed to his See. But the *Archbishop* hath a power as *Metropolitan*, to supply the Defects of the *Suffragans* of his Province; and so this *Right of Collating* upon defect of the *Ordinary*, comes to him by *Right of Devolution*.

*Hob. 17.
Brownl. 21.
27.*

But how then comes the *King* to his *Right after the Metropolitan's Neglect*?

That is, say our *Lawyers*, *Because the King is Patron Paramount of all the Benefices within the Realm*. The meaning is, That the *King* by *Right* of his *Crown* is to see that all *Places* be duly supplied with persons fit for them: and if all others whom the *Law* hath

*Dr. & Stud
124.
Plowd. C. 1
498. l.*

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entrusted, do neglect their Duties, then by the natural Order and Course of Government it falls to the Supreme Power, which is to supply Defects, and to reform Abuses.

3. The Bishop hath the Right of making an Avoidance by Deprivation or Resignation. For, as he hath the power of putting-in, so the Law hath lodged in him the Judicial power of proceeding against Offenders, and hath not left that to the Judgment of the Patron. If we enquire, Who by our Law is made the proper Judge of a beneficed Person, whether he behaves himself so as to deserve to lose his Benefice? Will any one say, that the Law hath put this into the Patron's hands? Yet all those who justify these Bonds of Resignation, must in effect say, that the Patrons are the proper Judges: for they have the real power of Deprivation in their Hands, and may execute it when they please.
Which

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Which is such an Arbitrary Jurisdiction, as would be thought intolerable in other Hands.

In all Causes of *Deprivation* of a person actually possessed of a *Benefice*, these things must concur.

1. A *Monition* or *Citation* of the Party to appear.

2. A Charge given him, to which he is to Answer, called the *Libel*.

3. A *Competent Time* assigned for the *Proofs* and *Answers*.

4. A *Liberty* for *Counsel* to defend his Cause, and to except against the *Proofs* and *Witnesses*.

5. A *Solemn Sentence* after hearing all the *Proofs* and *Answers*.

These are the *Fundamentals* of all *Judicial Proceedings* in the *Ecclesiastical Courts*, in order to a *Deprivation*: and if these things be not observed, the party hath just Cause of *Appeal*, and may have a *Remedy* by a *Superiour Court*. And these *Proceedings* are agree-

agreeable to the common Justice and Reason of Mankind: because the party accused hath the liberty of Defence, and the Right of Appeal. But there is nothing of all this, in Bonds of Resignation: for the Patron takes the Advantage of the Forfeiture of the Bond, and so without any Trial, or Proof, or Sentence, deprives him of his Benefice.

Some who are no Friends to the Ecclesiastical Courts, would have no Deprivation of a Benefice, but by Proceedings at Common Law; because it is a Freehold. Suppose that it were so (which seems contrary to the Course of the Law: for the Bishop in a Plea to a *Quare Impedit*, saith, *Nihil clamat præter Institutionem & Destitutionem Clericorum*; and Ecclesiastical Deprivations have been still allow'd at Common Law, if they have been according to the Ecclesiastical Laws) but taking it for granted, that a Depri-
vation

vation of a *Freehold* ought to be at Common Law : what then ? What, without an Indictment, and without a Trial by a Jury ? No hearing of the Cause, no Witnesses examined, no Counsel to be heard, no Judgment by his Peers ? And can this be agreeable to the Fundamental Laws of *England*, to have Men forced out of their *Freeholds* in such an Arbitrary manner ? What would they think, if other *Freehold-Estates*, which hold of a Superiour Lord, were made so Arbitrary, as to depend upon the Will of the Lord so, as to be turned out upon six Months notice ? Let us see *Bonds of Resignation* practised upon such Estates ; and then we shall soon find what Clamours will be made against them, as overthrowing the Fundamental Rights and Liberties of the People. Is there not the same Reason in this Case ? Is there not greater ? because these Benefices are not Free-

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3 Inst. 341.

Freeholds which are held of the Patrons, but they have only a Right to present Fit Persons to them. But it may be, that the Defenders of these Bonds will deny Benefices to be *Freeholds* by the Law of *England*. It is easie to guess what some Men would have them to be, by these *Bonds*: I am sure far enough from *Freeholds*. But such private Transactions cannot alter the Nature of things: and we are now enquiring, What Benefices are, by the Law of *England*? It is disputed at Common Law, In whom the Freehold of the Glebe-land of a Benefice is, during the Voidance? And it is agreed, That it is neither in the Patron nor Ordinary: because it was given to the Incumbents and their Successors. And therefore they tell us, it is then in *Abeyance*; which is a pretty way of expressing, That the Law takes care that it shall come to the next Incumbent, notwithstanding the

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the Discontinuance by Death of his Predecessor : and I think it had been as well said, That it was in the Law, although not in any person. But it is not disputed, but that as soon as another Incumbent is in possession, the Freehold is in Him: for those are Littleton's Words, Sect. 647. And my Lord Coke saith, That the Incumbent cannot be look'd on, as a meer Tenant for Life : because he may have such Writs, which none can have but a Tenant in Fee-simple or Fee-tail ; and he may receive Homage, which a Tenant for Life cannot do. And for this he goes as far back as the time of E. 1. But long before that, in Glanvil's time, which was of H. 2. it is said, That he that is possessed ^{Glanvil, l. 12. c. 20.} of a Benefice by Institution from the Bishop, and judged fit by him, shall enjoy it for his Life, although the Right of Advowson be disputed. Which is several times affirmed by my Lord Coke upon good Reason. In one place he saith,

- 1 *Inst.* 343.b. saith, That at the Common Law, if a Church be once full, the Incumbent could not be removed: (excepting Just Cause of Deprivation) and Plenarty generally was a good Plea in a Quare Impedit, or *Affise* of Darcin Presentment: and the Reason of this was, to the Intent the Incumbent might apply himself to his Spiritual Charge. 2. The Law intended, That the Bishop that had Cure of Souls within his Diocess would admit and institute an able Man for the Discharge of his Duty and his own; and that the Bishop would do right to every Patron in his Diocess. In another place he saith, That
- 2 *Inst.* 357. by the Order of Common Law, if one had presented unto a Church whereto he had no Right, and the Bishop had admitted and instituted his Clerk, this Incumbent could not be removed for divers Reasons: 1. For that he came into the Church by a Judicial Aet of the Bishop. 2. That by the Common Law, in every Town and Parish there ought to be *Persona idonea*:
and

and when the Bishop had admitted him able, which implied that he was idonea persona, then the Law had his final Intention, viz. That the Church should be sufficiently provided for. 3. That the Incumbent having Curam animarum, might the more effectually and peaceably intend so great Charge; the Common Law provided, That after Institution he should not be subject to any Action, to be removed at the Suit of any common Person, without all Respect of Age, Coverture, Imprisonment, or Non-sane-memory; and without Regard of Title, either by Descent or Purchase, or of any Estate. Are these things consistent with Bonds of Resignation?

But it may be said, That here is no Deprivation supposed, but a voluntary Resignation: and what hurt is there, if it be a Man's own Act?

I answer, That we are not only to consider the Act of the person, but the Interest and general Concernment
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of the Church in it. For in all matters of such a publick Nature, we are not to regard so much the Consent of the party, as the Nature and Consequence of the Act it self. If it be an illegal thing, and tend to subvert the Rights of the Church, it cannot make it legal to say, that it was his own Act. Now as to this kind of Resignation, we are to consider these two things:

1. That if the Resignation be not into the hands of the Bishop, it is an illegal Act, and void of it self.

2. That if it be into the Bishop's hands, he hath the power in Law to Accept it or not.

1. That the Resignation must be into the hands of the Bishop. For a Resignation into the hands of the Patron, is by the *Canon Law* declared to be null and void of it self. So *Innocent IV. ad c. 6. de rerum per.* And this is grounded on the Text of the *Canon Law*, C. 17. Q. 2. c. *Gonsaldus*: and

on

on the Appendix to the *Lateran Council* under *Alex. III. De Renunt. tit. 15.*

*v. Elamin.
Parif. de Re-
signat. l. 7.
c. 1. n. 9.*

c. pen. where it is declared to be an unworthy thing, and contrary to the Canons,

to resign into the hands of Patrons. And

Alex. III. forbids it absolutely under an *Anathema*, *De Renunt. c. 4.* which

is confirmed by *Innocent III. c. 8.* in the *Decretals*. But we are to consider

especially, how far this part of the Canon Law was here receiv'd; and

we can have no better a Judge in this Case than *Lyndwood*, who saith posi-

*Lyndw. f. 55.
c. Ne lepra.*

tively, that *Renuntiatio facta in manus Laici etiam sponte non tenet*; i. e. a Re-

signation made into the hands of a Lay Patron, if it be never so free, doth

not hold: and therefore he saith, it must be made into the hands of Him,

who hath the *Ordinary Jurisdiction*, and therefore hath power to Admit.

He observes two things very material as to the point of Resignation:

on:

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1. That

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1. That a Voluntary Resignation, though not to the *Ordinary*, deprives the party of the possession; so as he cannot recover, although he be not wholly divested of the Property, or Right to the thing: *Quia sine consensu Superioris non tenet Resignatio*: and this is founded on that Fundamental Reason, That the Care of the Diocess belongs to him, who hath the Ordinary Jurisdiction, who was the Bishop: but as *Lyndwood* observes, by *Custom and Composition*, this is put into other hands; as in places of Exempt Jurisdiction. And so where the power of granting Institution is lodged by the Bishop's Consent, and a *Prescription* upon it; there is a power likewise of Receiving a *Resignation*: but not in any, who have only a Delegated power from the Bishop. For there is a Difference in Law and Reason between an *Ordinary Power* depending on an ancient *Prescription and Composition* (as it is in several

several places in the *Deans* and *Chap-
ters* within certain *Precincts*) and an
Ordinary Power in a *Substitute*, as a
Chancellor or *Vicar-General*. For al-
though such an Officer hath the same
Court with the Bishop, so that the
Legal Acts of the Court are the Bi-
shop's Acts, by whose Authority he
sits there ; so that no Appeal lies from
the Bishop's Officer to himself, but to
the Superiour: and although a *Com-
missary* be allow'd to have the power
of the *Ordinary* in *Testamentary Causes*,
which were not originally of *Spiritual
Jurisdiction*, as it is said in *Henflow's*
Case, with which *Lyndwood* agrees :
yet in Acts of *Spiritual* and *Volunta-
ry Jurisdiction* the Case is otherwise.
For the Bishop by appointing a *Chan-
cellor*, doth not develt himself of his
own *Ordinary Power* ; but he may de-
legate some parts of it by *Commission* to
others, which goes no farther than is
expressed in it. For it is a very great

6. De Appel.
c. Roman.
Lyndw. f. 54.

9. R. 41.
De Testam.
v. Stat. v.
Approbat.

6. De Officio
Vicarii, c. 2.

Mistake in any to think, that such who act by a *Delegated Power*, can have any more power than is given to them, where a *Special Commission* is required for the Exercise of it. For by the *General Commission* no other Authority passes, but that of *hearing Causes*: but all Acts of voluntary Jurisdiction require a *Special Commission*, which the Bishop may restrain as he sees Cause. For as *Lyndwood* saith, *Nothing passes, virtute officii, but the hearing of Causes*: so that other Acts depend upon the Bishop's particular Grant for that purpose. And the Law no where determines the bounds of a *Chancellor's Power* as to such Acts; nor can it be supposed so to do, since it is but a *Delegated Power*: and it is in the Right of him that Deputes, to Circumscribe and Limit it. Neither can *Use* or *Custom* inlarge such a power, which depends upon another's Will. And however, by modern practice,

practice, the Patents for such places have passed for the Life of the person to whom they were first granted; yet it was not so by the ancient *Ecclesiastical Law* of England. For *Lyndwood* De Sequestr. v. Officiales. affirms, That a Grant of Jurisdiction ceases by the Death of him who gave it: *per mortem deputantis cessat Potestas Officialium*: (or else it could never pass into the Dean and Chapter *sede vacante*; or to the Guardian of the Spiritualities.) And he gives a good Reason for it; *Nè invitum habeat Officialem sibi fortassis odiosum*. It's true, that by the Statute 37 H. 8. c. 17. meer Doctors of Law are made capable of Exercising all manner of *Ecclesiastical Jurisdiction*. But it doth not assign the Extent of their Jurisdiction, but leaves it to the Bishops themselves, from whom their Authority is derived. And the Law still distinguishes between *Potestas Ordinaria* and *Delegata*: for the former supposes a

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person

Bracton, l. 5.
c. 2.
Fleta, l. 6. c. 37.
1 Inst. 96.
Cowel, v.
Ordin.

person to act in his own Right, and not by Deputation ; which, I suppose, no Chancellors or Officials will pretend to. But how far now, a Commission to exercise Jurisdiction doth hold, when the person who gave it is dead, is not my present business to enquire ; but in *Sutton's Case* it seems to be taken for granted by the Council, that a Chancellor's Patent, confirmed by Dean and Chapter, doth give a Man a Freehold for Life, if he be capable of doing his Duty ; otherwise he may be deprived for Insufficiency, as Doctor Sutton was. But Noy saith, That the Court was in doubt, how far the Act of the Predecessor could bind the Successor as to the Profits. And in the Prebend of *Hatcherly's Case*, Dodderidge declared, That Ecclesiastical Jurisdiction in Judicial Acts may be executed by Substitute : but a Grant of it is not good, but during the Bishop's Life ; and shall not bind the Successor. And Coke

Cr. Car. 65.

Noy, 91.

352.

Coke thought it a very hard thing, That the Successor should not remove him, but be bound to answer for the Acts and Offences of a Commissary, which he never put in. But these things belong not to our present business, any farther than to shew, that however in some Cases the Bishops may substitute others, yet as to Resignations of Benefices, for all that I can find, the Law only takes notice of the Bishop himself.

Lyndwood observes, that there is a difference to be made between the Resignation of a Simple Benefice, i. e. where there is no Cure of Souls, and of such a one that hath such a Cure going along with it. In the former Case he saith, That a Resignation may be to the prejudice of the Party, without the Bishop's Consent: but in the latter, where it may be to the prejudice of Others as well as of himself, it hath no force without the Bishop's Ratification: *In hoc casu necessaria est Ratihabitio Episcopi.* So that no

Resignation of a Cure of Souls can be of any Validity without the Bishop's Acceptance. In the Case of Smith against Foanes, it was resolved and agreed by all upon Evidence at Bar, That a Resignation to a Proctor, does not make the Church void, until it be accepted by the Bishop, and acknowledged before him.

Noy, 157.

2. But suppose the *Resignation* be made into the hands of the Bishop, is he bound to *Accept* it? By what Law? For what Reason? Must he not enquire into the Reason and Inducements of the *Resignation*, whether it be corrupt or not? No Bishop can be bound to accept a corrupt *Resignation*; and whether it be so or not, he is bound to enquire: and if he be not satisfied, by what Law can he be required to do that, which he cannot do with a good Conscience? If the Law hath trusted him with accepting a *Resignation*, it hath likewise trusted him with judging, whether it be fit to be

be accepted or not. In *Gayton's Case* it is plain, That the Bishop may refuse a Resignation before a Publick Notary, when there was a Condition annexed to it, which the Law doth not annex. For in this Case, the Condition was, That if such or such a Person were not presented within six Months, the Resignation should be null: which Coke then said, made it void, because Resignations ought to be free: and this is a Judicial Act, to which a Condition cannot be annexed, no more than an Ordinary may admit upon Condition.

But it may be objected, That in Case of *Donatives* the Resignation must be into the Patron's Hands, as in *Gayr's* and *Fairchild's Case*: why then may not a Resignation be good to a Patron in other Benefices, since those are as really Benefices as the other? *Telvert. 60.
Moor, 765.*

The difference is, that there is no Presentation to the Bishop in *Donatives*. For, it is agreed by the Judges in that Case,

Cr. 2. 63.

1 Inst. 344.

1 Inst. 344.

Regist. 40. 3.

Case, That if there were a Presentation once made to the Bishop, it ceases to be a Donative, and becomes always Presentable. So that the Case of Donatives is very different; for we say, that wherever the Bishop hath a Right to admit, it is his Right to accept of a Resignation. But in this Case, the Bishop is supposed to have nothing to do in the Admission or Institution of the person. If it be asked, How the Bishops came to lose their Right of receiving the Presentation to these Benefices? I answer, That they seem to me to have come one of these two ways: 1. By Royal Licence; so my Lord Coke saith, That the King may not only found a Church, or Free Chapel Donative himself; but may License any Subject to do the same. But the Register supposes a Royal Foundation, and not a meer Royal Licence; and that it must be proved to be Ancient too: and therefore a New Licence will not come up to the Register. 2. By

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Peculiar Privilege. As when a Lord of a Manor in a great Parish, having his Tenants about him at a remote distance from the Parish-Church, offers to build and endow a Church there, provided that it should belong entirely to him and his Family, to put in such persons as they should think fit, if they were in Holy Orders, It's very possible, that the Bishops at that time, to encourage such a Work, might permit them to enjoy this Liberty; which being continued time out of mind, is turned into a *Prescription*. If these *Donatives* had been common, the Mischief would have been more visible: but being so few in comparison, they have been less taken notice of. And they are to be distinguished from those called *Sine-cures* and *Exempt-Jurisdictions*.

For *Sine-cures* in Truth, are *Benefices presentable*; but by means of *Vicarages* endowed in the same places, the

the persons who enjoy them, have by long Custom been excused from Residence, which is the most can be said for them. And such *Sine-cures*, if they be resigned, it must be into the Bishop's hands.

Exempt-Jurisdictions are not so called, because under No Ordinary; but because they are not under the Ordinary of the Diocese, but have one of their own. These are therefore called *Peculiars*, and they are of several sorts.

1. *Royal Peculiars*; which are the King's Free Chapels, and are Exempt from any Jurisdiction but the King's; and therefore such may be Resigned into the King's hands as their proper Ordinary; either by *Ancient Privilege*, or *Inherent Right*. But how far Resignation may be made to the King as Supreme Ordinary, as in *Goodman's Case*, it is not here a place to examine.

2. *Archbishops Peculiars*; which are not only in the Neighbour-Diocesses, but dispersed

Lynd. f. 64. 80.

Rolls Abridg.

2. 356.

Coke, 12. 41,

42.

disperſed up and down in remote
places: For it appears by *Eadmerus*,
That wherever the Archbiſhop had an E-
ſtate belonging to him, he had the ſole
Jurisdiction as Ordinary,

Eadm. Hiſt.
in *Anſelm.*
p. 22.

3. Deans and Chapters Peculiars;
which are places wherein by Ancient
Compoſitions the Biſhops have parted
with their Jurisdiction as Ordinaries, to
theſe Societies; whoſe Right was not
Original, but derived from the Biſhop;
and where the Compoſitions are loſt, it
depends upon Preſcription; as in the
Deans and Chapters of St. Paul's and
Litchfield, which are mentioned in
the Books, 11 H. 4. 9.

Rolls Abridg.
2. 357.

4. Peculiars belonging to Monaſte-
ries. For, the richer Monaſteries were
very uneaſie, until they had obtained
either from the Biſhops, or from the
Popes (which proved the moſt ef-
fectual, but more chargeable way)
an Exemption from Ordinary Jurisdi-
ction. Thoſe Churches, which the Mona-
ſteries

series had gotten to be annexed to themselves, were called *Appropriations*; but how far these were Exempt from the *Ordinaries* Jurisdiction, is not fully understood; and therefore I shall endeavour to explain it.

1. *Appropriations* did not at first imply any *Exemption* from the *Ordinary*. For it was expressly provided in the C. 16. Q. 2. Canon Law, That no persons should be put into such Churches without Institution from the Bishop; to whom the *Incumbents* were to be answerable in all *Spiritual Matters*; as in all *Temporal*, to the *Abbots*. And in the oldest *Appropriations* which I have seen, there is a *Salvo per omnia Jure Episcopali*: which words are inconsistent with an *Exemption*.

2. The *Forms* of *Appropriation* were different afterwards. For although none could be made without the Bishop's Consent, yet that Consent was expressed in different ways, and had different Effects.

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If the Bishop only confirmed the Lay Patron's Gift, then nothing but the Right of Patronage passed, and his Jurisdiction remained. If the Bishop joyned in the Donation in these Words, *Concedimus vobis talem Ecclesiam*; then he passed away his Temporal Rights, as to that Church. If the Bishop granted the Church *Pleno Jure*, then the Canonists say, he passed his Diocesan Right: which consisted in Rights which the Bishop had distinct from his Episcopal Jurisdiction: which it was thought he could not part with by any Act of his; for that were to devest himself of his Order.

*Ext. De Depo-
nat. c. Pastor.*

Lyndw. f. 80.

3. Appropriations, confirmed by the Papal Authority, were allowed to carry with them Exemptions from the Ordinary. And therefore the Monasteries which could bear the Charge, did not think themselves free from their Ordinaries, till they had obtained Bulls for that purpose: and then they

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they took themselves to be free in their *Conventual Churches*, as well as their *Chapels*; or *Oratories* on their own *Lands*.

4. All *Papal Exemptions* are taken away by *Act of Parliament*, 31 *H. 8. c. 13.* and the *Churches* so exempted, are put under the *Jurisdiction* of the *Ordinary* of the *Diocese*, or such *Commissioners* as the *King* shall appoint. So that no *Papal Exemption* can now be pleaded, as to *Appropriated Churches*; how clear and full soever the *Charters* of *Exemption* were. This is a thing so little taken notice of, that I shall set down the Words, *Sect. 23.* *Be it further Enacted*, That such of the said *Monasteries*, &c. and all *Churches* and *Chapels*, to them, or any of them belonging, which before the *Dissolution*, &c. were exempted from the *Visitation* or *Visitations*, and all other *Jurisdiction* of the *Ordinary* or *Ordinaries*, within whose *Diocese* they were situate or set, shall from
thenceforth

thenceforth be within the Jurisdiction and Visitation of the Ordinary or Ordinaries, within whose Diocess they or any of them be situate and set ; or within the Visitation and Jurisdiction of such Person or Persons, as by the King's Highness shall be limited or appointed ; this Act, or any other Exemption, Liberty or Jurisdiction, to the contrary notwithstanding.

Therefore no persons who enjoy the Estates belonging to Monasteries, can now plead an Exemption by Virtue thereof from the Ordinaries Jurisdiction ; nor that they have a Power to put-in and put-out as they please, without any regard to the Bishop's Authority.

But suppose there were no Endowment, and that the Churches were built on the Site of the Monasteries, and so were supplied by their own Body ; then such persons are wholly at their Will, and they may turn them out as they please. I answer ;

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I confess the Condition of such Stipendiaries, is as bad as of those who hold their Benefices under Bonds of Resignation. For Tenures at the Will of the Lord, are the worst of any. But it is to be hoped, that such Persons who enjoy such Estates as were originally designed for the Support of the *Parochial Clergy*, (however at first fraudulently perverted by the Combination of the *Monks and Popes*) will at the least take Care that the Cure of Souls be duly provided for in such places. For that Burthen goes along with the Churches Revenue in whose Hands soever it be : and so they are both in Law and Conscience to see the Places well supplied. And by the Statutes of Dissolution, as they do enjoy the Rights, so they are bound to provide for the Churches: and where they were *Parochial*, to see that there were a fixed Incumbent with a competent Maintenance ; which the Law always took a particular care of. II. It

II. It is time now to consider the *Precedents*, which have been produced to shew that these *Bonds of Resignation* are not against Law.

The first is of *Jones and Laurence, & Jac.* A Bond was given to resign the Benefice he was presented to, within three Months upon Request: and it was alledged in Court, That it was a *Simoniacal Contract*, and against Law. Cr. 2. 248.

On the other side it was said, That there doth not appear any *Simony* upon the Condition: and therefore Judgment was given for the Bond. But a Writ of Error was brought in the *Exchequer-Chamber*; and the principal Error insisted on, was, That this Condition was against Law. But the Judges of the *Common Bench*, and *Barons of the Exchequer* held, That the Obligation and Condition are good enough. For a Man may bind himself to resign upon good and valuable Reasons, without any Colour of *Simony*: as to be obliged to resign, in case of

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Plurality or Non-residence ; or if his Son be at Age. But if it had been for a Lease of the Glebe or Tithes, or a Summ of Money, that had been Simony, &c. and so the Judgment was affirmed.

To this Precedent I answer, That the Reason of the Judges is insufficient. For it comes to this: the Bond is good because there may be good Reason for it. May it not be said on the other side, The Bond is naught, because there may be a very bad Reason for it? And a Bond that may be turned to so very ill Uses, it cannot but seem strange to me, that the Judges should affirm it to be a good Bond. If the particular Reasons had been made the Conditions of the Bond, they might have judged upon them: but the Bond was general, and no Condition in it but Notice. Therefore the Judgment must be, That a Bond is reasonable, if no bad Conditions appear in it: which makes the Incumbent a Slave to

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to the Patron, and overthrows the just Rights and Liberties of the Clergy; and lays them open to Perjury, when they give such a Bond meerly to obtain a Presentation. And they very well knew that none could be possessed of a Benefice without an Oath against all *Simoniactal Contracts*, either directly or indirectly. Why did not the Judges declare, that it was *Simony* within their Oath? But they were only to judge of the Law. And how could they judge this not to be a *Simoniactal Bargain*? Because there was no *Simoniactal Condition* in it. But what is a *Simoniactal Condition*? Where hath the Common Law determin'd it? And by what Rule? Yes, say they, *A Lease for Tithes, or a Bargain for Money, had been Simony*. But how come they to determine that no other Contracts are *Simoniactal*; when they own, *That Simony is not under their Cognisance*? Did they ever offer to advise with the

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Civilians, What was a *Simoniacal Contract*, according to the Ecclesiastical Law? Not the least mention of this: and therefore I cannot but think this a Judgment without sufficient Reason to support it.

Gr. 2. 274.

The same Cause came on again the next Year: and there it is declared, *That it was not Simony, but good Policy to tie him to resign; and if it were, it is not material.* Here are two good Points declared: 1. *That Bonds of Resignation are good Policy.* To what End? To insnare Mens Consciences; to make the Church a Prey to corrupt Patrons; to keep Men from doing their Duties, least they should displease their Patrons. If this be good Policy, let it rather pass for that, than for good Law. 2. *That it is not material as to the goodness of the Bond, whether it be Simony or not.* Then it seems a *Simoniacal Contract* holds good in Law: which, I think, was no good Policy for Judges to declare. But

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But we are told, That 15 Jac. in the Case of Paschal and Clerk, it was said by the Court upon Evidence, That if the Patron takes a Bond of Resignation at three Months warning, it was Simony within the Statute. And for this we are referr'd to the Roll, 2051. I wonder this Judgment is not hitherto disproved, if the Roll be falsified; and if not, here is Judgment against Judgment.

But again, in the Case of Babington and Wood, it was resolved on the same Grounds with that of Jones and Lawrence, and so deserves no new Consideration: and several other Judgments are said to have been given since on the same Grounds.

Cr. Car. 180.
Hutton, 110.
Jones, 220.
Kemble, 2. 446.

But let us compare this Case with such as have been adjudged to be Simony in the Courts of Common Law.

In the Case of Byrte and Manning, The Court held, That if a Man entred into a Contract to procure a Presentation,

Cr. Car. 426

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in Consideration of the Marriage of his Son, that had been a Simoniackal Contract. Why is not a Bond of Resignation, as much Simony, as a Consideration of Marriage; when both are made equally the Conditions of obtaining a Presentation?

Cr. Eliz. 789.
C. 12. 100.
Cr. 2. 385.
Noy, 25.
Bulstrode, 3.
90.

If a Simoniackal Contract be made, and the Person presented not at all privy to it, he is to incur the Penalty of it: but if a Man be privy to a Bond of Resignation in order to a Presentation, he shall not be guilty. And yet in the one Case, a Man swears with a good Conscience, which I think he cannot in the other.

Hob. 165.

In the Case of Winchcomb and Pulleston, it was declared to be Simony, to purchase the next Presentation, when the Incumbent was still alive, but in a Fit of the Strangury. And yet this was not within the Letter of the Law: for the Living was not actually void. Therefore such Acts, as are against the Design and Reason of the Law, are
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forbidden by it. And the like was affirmed by Justice Hutton in the Case of *Winch*, 63. *Sheldon* and *Bret*. In a late Judgment in Chancery, Bonds of Resignation at pleasure to Patrons by their Clerks, are damned in Equity, when any ill Use is made of them. But why should any such Bonds be allow'd in Law, which are liable to such ill Uses?

Rep. Chancery, 2. 399.

I conclude with the Words of my Lord Coke, That the Common Law doth detest Simony, and all corrupt Bargains for Presentation to any Benefice: and its design is, that a fit Person for the Discharge of the Cure should be presented freely without Expectation of any thing. How then can Bonds of Resignation be agreeable to Law?

Having thus dispatch'd the main Point against all General Bonds, which are made the Conditions of obtaining a Presentation; there remain only some Query's to be resolved.

(1.) Sup-

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(1.) Suppose a Bond be required only to tie Men up to do their Duties, and to keep them from Non-Residence. I answer,

(1.) That the Patron is to blame to pitch upon a Person to discharge such a Cure, of whom at the same time he discovers such a Mistrust, as to need a Bond to make him do his Duty. And if a Man makes no Conscience of his Duty without a Bond, I doubt he will make very little with it. If he could make him a good Man by his Bond, it were of great Use; but if he be not, he may do the more Mischief by continuing in his place by the Force of a Bond. So that I look on such Bonds, as apt to raise Scruples in good Mens Minds, and to do no good upon bad ones.

2. That all wise and good Patrons will consider the general Mischief, more than a particular Inconvenience. And what greater Mischief can come to our Church, than to have Bonds
of

of Resignation brought into request ? For, besides corrupt Patrons as to Bargains ; what Advantage will corrupt Patrons as to Religion make of it ? who by that Means will be able to turn out the Incumbents upon Notice given, when opportunity serves them : as is before observ'd in the Preface.

(2.) Suppose it be a very equitable Case, as for a Minor, is a Bond of Resignation unlawful ?

I answer, That there may be a Lawful Trust, in such a Case I do not question : but whether the Person who takes this Trust, can enter into a Bond, and take the Oath, I very much question, upon the Reasons already mention'd. For there may be a confidential Simony, as the Casuists call it : and the way to prevent it, is, say they, That the Trust be *sine pretii, pacti, Navarr. Man, modi, vel conditionis interventu.* For the C. 23. n. 109. taking of a Bond argues a Mistrust ; and is therefore contrary to the Nature of a Trust.

(3.)

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(3.) Suppose the Bishop himself requires a Bond of Resignation, as to a Prebend of his Church, If the Prebendary quit the Diocess; is such a Bond justifiable, or not?

The Bishop is, no doubt, bound to take all possible care of the Good of his Diocess, and to make his Preferments serviceable to that End. But if a Man knows beforehand, that without this Condition he cannot obtain it, and with it he may, he runs into a Snare by giving a Bond for that End; and after, taking the Oath against any *Simoniacal Contract*, directly or indirectly. I do think these Bonds of so bad a Nature and Tendency, that I do wish that no Countenance or Encouragement be given to them: especially by such, whose Example may encourage others to do that for bad Designs, which they do for Good. And Wise and Good Men will always shew the greatest Regard to that, which

which serves the most Publick Interest, and prevents the most growing Mischief.

(4.) Suppose the Incumbent of a Living makes an Agreement with another Clergyman, that he shall have a Lease of his Benefice from three Years to three Years; upon which he takes a Summ of Money, and gives a Bond of Resignation, before Harvest, and is to procure a Presentation from the Patron: is this Simony, or not, by our Law?

Here the Patron is only supposed barely to know and to consent, (which is hardly to be supposed in such kind of Cases) and that the Terms are only between the two Parties, (for I will not suppose the Bishop accessory to such Bargains) the Question is, Whether the Incumbent can with a safe Conscience part with his Benefice on such Terms? and whether the other can give a valuable Consideration for his Interest in it, if the Patron consents? I

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I answer, That the Law is as express against corrupt Resignations, as against corrupt Bargains for a Presentation; only the Penalty is not so great. The Words of the Act are, That if any Incumbent of any Benefice with Cure of Souls, shall corruptly resign or exchange the same, or corruptly take for, or in respect of the Resigning or Exchanging of the same directly or indirectly any Pension or Summ of Money or Benefit whatsoever; that then as well the Giver as the Taker, &c. shall lose double the Value of the Money so given, and double the Value of one Years Profit, 31 Eliz. c. 6.

It may possibly be said, That this is a distinct Clause from the other, and hath another kind of Penalty; and so cannot reach Persons in Point of Conscience as the other doth. But this is a strange way of dealing with Laws. For there is the same Penalty in the former Clause, only

only there is added a *present Avoidance*, and a *Disability in Law*: supposing these two left out, the one stands upon the same Foot with the other. And I would know, whether if these were gone, they could not as well make a Bargain for a Presentation, as for such a Resignation? And is there nothing of Conscience, or Honour, or a Regard to the Dignity of the Sacred Function in the Case? No Reverence to Laws made on purpose to deter Men from such sordid Practices? Is a Benefice to be look'd on as a meer Livelihood, to be bought and sold as other Estates are? Is there no Sense of any Spiritual Imployment 'going along with it? No Regard to the Charge and Trust that attends it? If nothing of a Spiritual Nature is to be consider'd in a Benefice, then there can be no such thing as *Simony*: and then their Hearts are at ease, and they may publish Papers for *Presentations*,

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tations, as well as for Resignation of Incumbents. But I will not suppose such hard things of Persons, who pretend to be in Holy Orders: but this I must put them in mind of; that there is an Oath to be taken, and a very strict one against all *Simoniack Contracts*, either directly or indirectly. And is wilful Perjury a thing to be slighted by any? especially by Churchmen, and in order to a Cure of Souls? I have already mention'd my Lord Coke's Saying, That *Simony* is the more odious, because it is ever accompanied with Perjury; for the *Presentee* is sworn to commit no *Simony*: and for this he refers to *Lyndwood*. And I have already shew'd, how *Simony* is to be understood according to him. If a solemn Oath comes to be slighted, and made little or nothing of; how can such Men pretend to Religion or Conscience? But it may be said, That *Simony* is to be determined by the Law; and the Law

3 Inst. 156.

Bonds of Resignation, &c.

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Law makes a Bargain with the Patron to be Simony, and not with the Incumbent. I have said enough already to shew, that the Statute doth not determine what Simony is, but only inflicts a severe Penalty on some sorts of it: and therefore it may be Simony, although not expressly against the Words of the Law. But the Words of the Law are express against corrupt Resignations: and I would fain know, whether a Resignation for Money be not a corrupt Resignation? And supposing the Patron innocent, can any Man of common Sense or Honesty, take the Oath, who comes in upon such Terms, that he hath made no Simoniackal Contract or Promise, to any Person or Persons whatsoever, concerning the procuring or obtaining the Rectory or Vicarage, &c. Is not this Bargain in order to the Procuring or Obtaining the Presentation? Let it be with whom it will, if it be for

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this End, it is *Simoniackal*; or else it will be hard to determine what *Simony* is. And as to such kind of Bonds of *Resignation* between Parties, without the Patron's privity; how can they signifie any thing, if the Bishop do not accept the *Resignation*? which I have shewed before must be into his hands. But these Men seem to set the Bishop quite aside; or to suppose him very Weak and Inconsiderate. All they look at, is the point of Law: And they may say, They have advised with Council; and they have told them, that there is nothing against Law in this Practice. How? not against Law? Did they ask them, whether this were not a corrupt *Resignation* within the Statute? No; but whether it were *Simony* or not? I hardly suppose any Man that understands what *Simony* is by our Law, would go so far: but they might say, It doth not void the *Livings*, nor bring a *Disability* on the Person; and

so

so far they said as the Statute doth;
But is this all, which Men of Conscience, and who take the Care of Souls, are to enquire after? What, nothing but whether the Benefice will be void or not? Or, whether the King may present or not? Are these all the Considerations, even of Clergymen, in such Cases? Such kind of Practices, which favour only of this World, are those which give such Advantages against our Profession, in such an Age of Infidelity as ours. Do not you see, say they, that they mind nothing but their bare Interest as to this World, and have no regard to Law or Conscience, where they contradict it? I am sensible how unreasonable it is, to charge a Profession with the Faults of a Few; and those in Comparison, I hope, not considerable in it. But we ought, if possible, to avoid any Scandal of this kind; for it strikes at the whole Body of the Clergy of our

K k 2

Church;

Church, and at Religion itself: which if we have any our selves, we shall be very tender of the Honour of. Some Men have a mighty Prejudice against any Churchmen meddling in Secular Affairs; although they be Matters of Justice and Mercy, which the Law of the Land calls them to: but my great Prejudice is against such Churchmen, who bring Secular Ways of Trafficking into Church matters; as though nothing were really minded; but buying, and selling, and getting Gam. Advancing of Trade is a noble Design in a Nation; and that which makes it considerable at Home and Abroad: but God forbid that such a way of Trading should ever be brought into the Church, or be suffered to go unpunished in it: for it will certainly Ruin the best Church in the World, by lessening the Reputation of Churchmen; by taking off the good Affections of the People,

Bonds of Resignation &c.

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People, and making them to run into
Faction and Infidelity.

There is certainly something more
to be regarded in these things besides
our own Interest: there is that of Re-
ligion, of our Church, and of the
Laws of the Land, which ought to
over-rule it. Suppose there were no-
thing but the bare Law in the case,
which expressly forbids all corrupt
Resignations: is it not fit for those
who are to preach Obedience to Laws,
to observe them, in what relates to
themselves? Ought they not to be
Examples to others in every thing of
good Report? and to abstain from
whatever tends to take off from the
Influence of their Doctrine upon the
People? and nothing doth it more,
than when they are suspected to come
among them by unlawful and indi-
rect means.

I have taken the Liberty in this
Discourse, to speak my Mind freely

K k 3

about

about Matters which touch upon
Law and Conscience; the Duties of *Pa-
 trons and Incumbents*; but I have done
 it, without any other Design, than
 of doing some Good, or at least pre-
 venting some Mischief to the Church
 I live in, and which I have a true and
 a just Value for. If I had not thought
 that this kind of *Simoniackal Contracts*
 were a great and growing Mischief,
 and had not had too much Reason
 to think so, I should have spared
 my Pains, as others have done; for
 I do not love to be uneasy to my
 self or others. I know very well,
 how ill such Discourses are apt to be
 taken by all that are concerned in
 them; viz. *Patrons, Incumbents*, and
 all such *Lawyers* that go about to de-
 fend them. But before I conclude
 this Discourse, I must request some
 things of all these; and then let them
 judge as they please; so it be with-
 out Prejudice and Partiality.

1. That

1. That Patrons would consider, That the Right of Patronage is a Trust committed to them; of which they must give an account to God: for there is an Obligation in point of Conscience, going along with it. It is hard to believe what is commonly reported, how slight many great Patrons make of their bestowing of Benefices, by letting Servants make their best Advantage of them; who scandalously expose the Livings, and themselves, and the Honour of those they depend upon. If Servants deserve to be gratified; for God's sake, let it not be at the Price of Souls. If there were no such thing as Religion, but that the pretended Care of Souls is nothing but an Artificial Way of Maintaining a Set of Men, to keep the People in a little better Order, by telling them of Moral Duties, and another World; then there were some Colour for such an affected Negligence

in these Matters: But I do not believe that any of these persons can satisfy themselves in such Absurd and Unreasonable Imaginations, against the Sense of all the Wiser and more considerate Part of Mankind. But it cannot be denied, that the Things which they are to teach the people in point of Morality, are very good Things, and necessary to be told them. This is all I desire at present. And is it of no Consequence what sort of Men those are, who are entrusted with the Teaching people their Duties to God and Man? If Religion were only to be regarded in point of Policy: those must be far from Politicians, who have no regard to the Qualifications of the persons they put into such places. For Ignorant and Illiterate Men can never give them good Instructions; Scandalous and Debauched Persons will certainly do abundance of Mischiefs,

chief, making the people more loose
and debauched, than otherwise they
would be. Men of ill Principles will
infill them into the Heads of the
busie part of those they converse a-
mong, and take upon them to guide;
and make them far more ungovern-
able than otherwise they would be.
I have no very great Opinion of the
World as it is; but I cannot but
think, that it would be yet much
worse, if an Ignorant, Vicious, Tur-
bulent, Seditious Clergy were put in-
to all such places as Patrons dispose
of; and they know not, but they may
be all such whom they present, if
they take no more care about them;
but suffer their Servants to make
what Bargains they think fit; who
mind not the Men, but the Advan-
tage they are to get by them. And
there is a just presumption, that
those are not very Deserving, who are
ready to drive such Bargains for them-
selves:

selves, and such Men are not to be
 valued, as Cattel in a Market by the
 Money they will yield. *And thus it is*
that *the* *Lawyers* would not en-
 courage their Clients in indirect meth-
 ods of obtaining Presentations. For
 here lies a great part of our present
 Mischiefe in the Clergymen who want
 Benefices, they say, We are igno-
 rant of the Law, but we go to those
 whose Business it is to understand it,
 and they tell us, They have Cases
 and Precedents in their Books, for
 such Bonds; and they have been
 many times adjudged in the Courts
 of Law to be good, and therefore
 why are we to blame if we submit
 to them? But here lies the great Mi-
 stake: the point is really a point of
 Conscience as to the Oath, but the
 Question put to them, can be only a
 point of Law, who are to give Judg-
 ment upon the Statute, and accord-
 ing

ing to the Rules of Judgment allowed in their Courts. But I cannot but observe, that there is no Precedent offer'd before 8 Jac. 1. and in the 15th. was a contrary Judgment. In the Beginning of Charles I. the former Judgment was affirmed; and from hence it hath come to be such a prevailing Opinion. I confess, that I am not satisfied, how far such Precedents, or one or two Judicial Sentences make a thing to pass for Law; nor whether the Authority of such a Sentence, or the Reason, is to give the Force of Law to it. I observe that my Lord Coke, when he speaks of the Laws of England; he reckons up *Common Law, Statute Law, Customs* 1 Inst. 11.
110. b.
115. b. *reasonable &c.* but he never mentions the Judgment of the Courts as any part of our Law; they being no more but a Declaratory Sentence of the Majority of the Judges, when it may be the other differ upon better Reasons,

Reasons; and when such Reasons come to be thought better by one more at another time, then the contrary must pass for Law on the same Grounds. How often do we hear that the Judges were divided in their Opinions In Point of Law? How often, that the greater number went one way, but Law and Reason on the other? Suppose a Lord Chief Justice of great Skill and Knowledge in the Law, to be unequally yoked with others of far less Judgment, how is it possible to prevent that Judgment shall not be given on the wrong side, if the three happen to be of an Opinion against him, or one be absent, and two be against one? In a late great Cause, viz. of *Commendam*, although three Judges concurred in Opinion, and the General Practice was allowed to be of that side, yet because one Judge differ'd from the rest, his Authority was produced against

against the Sentence of the Court, and for what Cause can this be, but the Supposition, that it is not the Sentence, but the Reason which makes the Law. My Lord Chief Justice Hale in a MS. Discourse of the History and Analysis of the Laws of England; Chap. 4. makes three Constituents of the Common Law of England: 1. The Common Usage and Customs; 2. The Authority of Parliament; 3. The Judicial Decisions of Courts of Justice: But how Consonant to one another in the Series and Succession of Time. This is spoken with great Judgment: For, no doubt, a mighty Regard ought to be shewed to a Concurrent Sense of so many Persons of Ability in the Law, in the different Times wherein such Matters have been before them; and this is the highest Authority for expounding the Law; but it cannot amount to the Making of a Law. For, as the same Excellent Person flings adds;

adds; It's man, the Decisions of Courts of Justice, although by the strength of the Law of this Kingdom, they do hold as a Law between the Parties to it in that particular Case in Question, till Reversal by Error or Attaint; yet they do not make a Law: for that only the King, by the Assent of Parliament, can do. All that I aim at, is not in the least to take off from the Authority and Reverence due to Judicial Decisions, built upon a General Agreement from time to time; or upon Evident Reason in point of Law: but only that things should not be so positively asserted to be Law, which are built only on a few Modern Precedents, without any convincing Evidence: Which I take to be the present Case.

3. That the Clergy would mind their own Honour and Interest, and that of the Church and Religion so much

much as not to Accept of Benefices upon such Ensnaring Terms as those of Bonds of Resignation.

If what I have said on this Argument be true; I am sure they have all the Reason in the World to Refuse them, when they know not what the Consequence of them may be; and they do know what kind of Oath they are to take. And no Man can honestly take an Oath, that is not satisfied, that such Bonds are no Simonical Contract in the Sense of that Law, by which he is required to take the Oath. Now the Oath is not imposed by the Courts of Common Law in pursuance of the Statute; for then it were to be understood according to the Sense and Meaning of it; but that very Statute leaves the Ecclesiastical Laws as they were; by which Simony is of a larger Extent than it is understood at Common Law; and by

by those Laws this Oath is required. Therefore my Request is to all such Clergymen, as are in danger of having such put upon them; that they would study the Case, and satisfy their Minds before they venture upon taking an Oath, which may afterwards rob them of that Peace and Tranquility of Mind, which every Good Man will Esteem above any Benefice in the World.

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